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PROCUREMENT APPEALS

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FILE NO OPA-PA: 16-003

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

TLK Marketing Co. Ltd.,

Appellant.

DOCKET NO. OPA-PA-16-003

**MOTION FOR ORDER TO SUPPLEMENT
PROCUREMENT RECORD; MOTION FOR
DISCOVERY**

I. MOTION

TLK Marketing Co. Ltd., (“TLK” or “Appellant”), through counsel, requests the Hearing Officer for the Office of Public Accountability (“OPA”) to issue an Order compelling the Guam Visitors Bureau (“GVB”) to supplement the Procurement record filed on May 2, 2016, because GVB has not provided all documents to the OPA as part of its Procurement Record. Alternatively, TLK moves, pursuant to Title 2 Guam Administrative Rules & Regulations (“GAR”), Division 4, §12109(c), for an Order Requiring GVB to produce relevant documents omitted from the Procurement Record and Agency Report submitted in this proceeding. This Motion is supported by the accompanying Memorandum of Points and Authorities, all matters of record and such further evidence as may be adduced

at a hearing hereon.

II. MEMORANDUM OF POINTS AND AUTHORITIES

A. THE PROCUREMENT RECORD PROVIDED BY GVB IS INCOMPLETE AND MUST BE SUPPLEMENTED.

As the procuring agency in GVB RFP No. 2016-006 (the “RFP”), GVB has a statutory obligation to maintain an accurate and complete Procurement Record. *See*, 5 G.C.A. § 5249. Within five days after the filing of a procurement appeal, the agency must file a complete copy of the Procurement Record. 2 GAR Div. 4 § 12104(c)(3). The Agency must also file an Agency Report. 2 GAR Div. 4 §12105. While GVB submitted an Agency Report and Procurement Record, these records are incomplete.

GVB has failed to provide several material and relevant documents as part of its Procurement Record and Agency Report submitted in this proceeding. 5 GCA §5249 governs the contents of the Procurement Record. Nowhere in the Procurement Record has GVB included “a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement,” as required by 5 GCA §5429(b). GVB has also failed to provide audio recordings of the negotiations relating to the RFP required by 5 GCA §5429(c).

In addition to the Procurement Record, GVB is required to submit in its Agency Report “[a]ny other documents which are relevant to the protest...” 2 GAR Div. 4 §12105(e). GVB failed to comply with this requirement when it failed to submit the Negotiation Memorandum or other documents related to the presentation of the contract to the Board of Directors for approval.

TLK believes GVB may have excluded other relevant documents from the Procurement Record. These documents include communication and documents created after

the signing of the purported contract. In Appendix A to its Agency Report, GVB attached several documents intended to discredit TLK's acceptability as a contract partner. Among those documents was a letter to GVB from HIC dated April 20, 2016. Without seeing other communication between GVB and HIC post protest, TLK is unable to fully address these assertions. The procurement record includes any and all communication and/or documents relating to the procurement, especially if they were prepared or made after the filing of the protest. GVB's selective submission of post-protest documents support its self-serving purposes in this Appeal is not only a violation of 2 GAR Div. 4 §12105(e), but prejudices TLK. It is incumbent on GVB to deliver and complete Procurement Record to the OPA, and TLK should not be required to identify all documents which may be relevant to its appeal, in part, because TLK has no way of knowing if other documents exists unless the GVB produces them. It is axiomatic that "[P]rotecting the integrity of the procurement process is one of the reasons for the requirement to create and maintain a procurement record." *In the Appeal of Latte Treatment Center, Inc.*, OPA-PA-08-008, Decision at p 17. GVB's incomplete and deficient procurement record—a procurement record kept by the key agency tasked with the care of Guam's vital tourism industry—is an especially troubling threat to the integrity of the procurement process.

The OPA can and should compel GVB to supplement its Procurement Record by producing: (1) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement; (2) audio recordings of the negotiations arising relating to the RFP; (3) audio recordings of the presentations; and (4) any and all documents, communications and records relating to the RFP, including billing issues, before, during and after the filing of the

Protest. In order for Agencies to be held accountable, there needs to be transparency and accurate record keeping. The Public Auditor has the “power, among others, to (d) Rule on motions, and other procedural items on matters pending before such officer.” 2 GAR §12109. A complete Procurement Record must be provided to the Public Auditor without delay, and GVB should be compelled to provide a full and complete Procurement Record to the OPA and the Appellant. If GVB does not have or did not maintain a record in respect to any of the four category of missing documents, then the OPA should require the Procurement Officer, Nathan Denight, the General Manager, to submit a statement under penalty of perjury that the missing documents, record or file was not maintained, kept or, if appropriate, destroyed. *See* GCA § 5250. (“No procurement award shall be made unless the responsible procurement officer certifies in writing under penalty of perjury that he has maintained the record required by § 5249 of this Chapter and that it is complete and available for public inspection.”)

B. IN THE ALTERNATIVE, GVB SHOULD BE COMPELLED TO PROVIDE FOR EXAMINATION, THE DOCUMENTS TLK SEEKS REGARDING THIS PROCUREMENT.

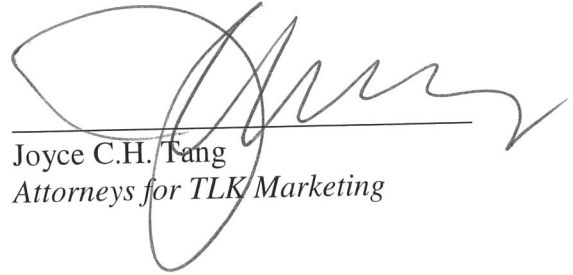
The Hearing Officer in a procurement appeal has broad authority to order discovery and require that witnesses and documents be produced in procurement appeals. 2 GAR §12109(c) authorizes the Hearing Officer to “require parties to produce for examination those relevant witnesses and documents under their control.” GVB is required to produce the entire Procurement Record and TLK is entitled to a full record to prosecute and defend this appeal. TLK will be severely prejudiced if it is limited to an incomplete procurement record, and these documents are not produced. TLK, therefore, requests that the Hearing Officer order GVB to provide the four categories of documents immediately.

III. CONCLUSION

GVB has a continuing obligation to protect the integrity of the procurement process by maintaining a complete and accurate procurement record. Based on the foregoing, the OPA should order GVB to supplement its procurement record as TLK requests, or in the alternative provide discovery regarding the documents omitted from the record. If any of the four categories of missing documents is not available, then the OPA should order Nathan Denight, the General Manager, to submit a statement under penalty of perjury that the missing documents, record or file was not maintained, kept or, if appropriate, destroyed.

Respectfully submitted this 27th day of May, 2016.

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